



INTERIOR BOARD OF INDIAN APPEALS

Larry Boyer Land & Cattle Co. v. Portland Area Director, Bureau of Indian Affairs

28 IBIA 135 (08/16/1995)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

LARRY BOYER LAND & CATTLE CO.,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 95-77-A
PORTLAND AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	August 16, 1995

Appellant Larry Boyer Land & Cattle Co. seeks review of a January 6, 1995, decision issued by the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), assessing it a fine of \$4,367.60 for the burning of crop stubble on Nez Perce Allotments 1031, 1034, and 1035. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

At the times relevant to this appeal, appellant held agricultural leases on the three allotments listed above. Each of those leases prohibited the burning of crop residue. As to Allotment 1031, covered by Lease No. 1-9160-90-94, paragraph 4 under Conservation Practices provided:

RESIDUE MANAGEMENT - Lessee agrees not to burn or permit to [be] burned, crop residue meadow or pasture; except for those grasses grown for seed production. Residue from any crop except grass harvested for seed, shall be returned to the soil for soil improvement. Damage for non-compliance is \$25.00 per acre.

Lease Nos. 1-9161-90-94, covering Allotment 1034, and 1-9162-90-94, covering Allotment 1035, contained a similar provision in paragraph 8 under Soil and Moisture Conservation Requirements:

Burning of crop residues, pastures, fence lines, or waterways is prohibited, unless prior authorization is given in writing by the Secretary. Grass seed crops that require burning for continued grass seed production are excepted from this provision. * * * (Damages: \$20 per acre.)

On April 29, 1994, the Director of Nez Perce Land Services notified the Northern Idaho Agency Superintendent (Superintendent) that appellant had recently burned crop residue on the three allotments, but that the Tribe had no record that permission to burn had been granted. On June 3, 1994, the Superintendent wrote to appellant, informing him that burning was a violation of his leases and giving him 10 days in which to show why he should not be assessed a fine of \$6,209.50.

Appellant responded by letter dated June 16, 1994, stating that the burn was conducted in order to control an infestation of Hessian fly. Appellant stated that it had been informed by the Soil Conservation Service (SCS) that a burn after April 1, 1994, would be permitted. It stated that its representatives also met with a BIA employee who

said it [a burn] would probably be okay [with BIA] since the [SCS] had okayed it. He said that he understood that burning because of the Hessian fly was a useful tool. He stated there would be no abnormal soil loss because the field would be planted to a fast emerging crop within hours after the burn. [The BIA employee] went on to say that he was unsure of his job situation at that time.

Appellant stated that it believed it had acted in good faith, the decision was planned six months in advance, and all parties participated in the decision. Appellant contended that "[i]t was felt that a one time burn would enhance the future productivity of these allotments."

BIA investigated appellant's claims. The SCS official responded that he had not approved a burn, because the SCS lacked authority over any burn occurring outside of the "critical erosion period" of December 1 through April 1, and that he would not recommend burning as a control measure for the Hessian fly. The BIA employee was no longer working at the Northern Idaho Agency, and so was unavailable to either support or refute appellant's statements.

On September 21, 1994, the Superintendent informed appellant that it was being assessed \$6,209.50 in damages, based upon \$25 per acre burned. Appellant appealed to the Area Director, who, on January 6, 1995, affirmed the determination that damages were due, but reduced the amount of damages to \$4,367.60, based on \$25 per acre for 80 acres (Lease No. 1-9160-90-94), and \$20 per acre for 168.38 acres (Lease Nos. 1-9161-90-94 and 1-9162-9094).

Appellant appealed to the Board.

Appellant bears the burden of proving that the decision appealed from was erroneous or not supported by substantial evidence. See, e.g., Lente-Dawson v. Albuquerque Area Director, 27 IBIA 289 (1995); River Bottom Cattle Co., Inc. v. Acting Aberdeen Area Director, 25 IBIA 110 (1994), and cases cited therein. Appellant attempts to carry its burden here by arguing at pages 1-2 of its Opening Brief that it acted in good faith; it was advised by the SCS "that a burning after April 1, 1994 would not create a compliance problem with the SCS"; that the former BIA employee had stated that he understood burning could be used to control the Hessian fly, that no abnormal soil loss would result because the field was to be immediately planted with a fast emerging crop, and that in light of SCS's position, "the proposed burning would probably not pose a compliance problem for" BIA; that the BIA employee did not advise appellant that it would need either a burn permit or further BIA approval; that a good crop was established after the burn; and

that there has been no allegation of damage to the allotments resulting from the burn or that appellant acted in bad faith.

Appellant's arguments are unpersuasive. At most, appellant has shown that two officials who lacked authority to approve a burn under its leases did not order it not to conduct the burn. Two of appellant's leases specifically required written approval of a request to burn; the third lease provided that the Superintendent could make adjustments or modifications in response to conditions or emergency situations requiring action to conserve the soil and water and to protect the resource. All three leases provided liquidated damages for a violation of the burn prohibition. Appellant failed to comply with the lease requirements. The fact that it alleges it acted in good faith does not overcome the unambiguous provisions of its leases.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Portland Area Director's January 6, 1995, decision is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge